

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 63046-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
QUENTIN T. CAMPBELL,	)	
	)	
Appellant.	)	FILED: May 24, 2010
	)	

Leach, A.C.J. — Quentin Campbell appeals from his jury convictions on two counts of assault and one count of felony harassment. Campbell argues that double jeopardy principles bar his conviction for two assault charges and that the assault charges should be considered to be the same criminal conduct for sentencing purposes. In a statement of additional grounds, Campbell raises a variety of other issues. We affirm.

**FACTS**

Campbell has a history of domestic violence, and the charges in this case arose from a physical dispute with his wife, Toma.<sup>1</sup> Campbell choked Toma on a prior occasion and often told her she was not a good enough wife and needed to

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<sup>1</sup> For clarity, we refer to Toma Campbell by her first name.

be more submissive. At various times, he had also threatened to make her abort their child, to kill her, to beat her, and to “pull an O.J.” on her. Toma left Campbell for a period of time but later decided to resume living with him. The reunification did not go well and on May 22, 2008, Toma told Campbell she wanted him to leave their apartment. Campbell became very angry, and the two got into an argument in their living room. Their daughter M.C., then 2, was present, and Toma’s son, B.S., then 12, was in his room.<sup>2</sup> M.C. became upset, and Toma took her into a bedroom to calm her down. Campbell followed. Campbell then put his hand over Toma’s mouth, and a struggle ensued. The two ended up on the floor with Campbell on top, holding his hand over Toma’s mouth and nose. As Toma experienced difficulty breathing, Campbell would let up but then resume pressing his hand on her mouth and nose. This happened about five times. Campbell was pushing hard on Toma’s head with his weight, forcing it to the side, and Toma was in pain. During this encounter, B.S. entered the bedroom and saw the struggle. B.S. thought Campbell was suffocating his mother or trying to snap her neck, and he thought his mother was going to die. He could tell she could not breathe and was about to black out. B.S. told Campbell to stop, but Campbell said he was not hurting Toma. Campbell told B.S. to tell his mother to stop yelling. M.C. was on the bed crying.

Campbell eventually let Toma get up, and she sat on the bed with M.C. Toma could hardly swallow, her throat was hurting, and she felt drained and very

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<sup>2</sup> A third child, J.C., was at school.

scared. Campbell then got a gun from the closet and cocked it. Campbell told B.S. that this is how a bitch gets handled. Campbell called Toma a bitch, a slut, a whore, told her he was going to kill her, that she was not good enough, that he would make her a mercy killing, and that he was going to kill her for God because she was not a submissive wife. Campbell pressed the gun against Toma's head and pointed it at her face, chest, and between her legs. He told her he would put 18 bullets in her head, that he would kill her and take the kids, and that if he didn't kill her he would have someone else do it. Campbell pulled his pants down and pushed his penis around in front of Toma and M.C. He told Toma that a real woman would not tell on him. After Toma told Campbell she would be a real woman, Campbell got dressed and left. Toma estimated that the encounter continued for about one hour. B.S. testified that the incident lasted from 30-60 minutes.

After Campbell left, Toma and B.S. cried and held each other. Toma said she was going to call someone, but B.S. urged her not to, telling her Campbell said he would kill her if she did. Because Toma was afraid to call the police, she called a neighbor, Pattie Schaak, who came over. Toma was crying and shaking when Schaak arrived. B.S. said to Schaak that he should have called 911 because Campbell had a gun on his mother. Schaak told Toma to get a diaper bag and her purse because they were leaving. Schaak first took Toma to her church and then to the police. Toma told Schaak that Campbell had choked her and that she saw stars. Officer Giger took Toma's statement. Toma was

extremely upset and had bruising on her chin and red marks on her throat and face.

On June 11, almost three weeks later, Federal Way police officers stopped Campbell while he was driving Toma's car. The police arrested Campbell and found a fully loaded .38 caliber revolver in the glove box. At trial, Toma identified the gun as the weapon Campbell used in assaulting her.

The State charged Campbell with second degree assault of Toma with a deadly weapon, felony harassment, and second degree assault by strangulation. The jury convicted Campbell on each count and found that he was armed with a deadly weapon as to the first two counts. The court found that the assault with a deadly weapon charge merged with the felony harassment charge but that these two offenses were separate from the assault by strangulation charge. The court imposed an exceptional sentence totaling 74 months incarceration. As a condition of the sentence, the court imposed a ten-year no-contact order barring Campbell from contact with Toma and her three children.<sup>3</sup> Campbell appeals.

#### ANALYSIS

Primarily, Campbell contends that he committed a single course of conduct directed at one victim. He argues that his conviction for two assault offenses violates double jeopardy and that his offender score should have been calculated as if the two charged assaults were the same criminal conduct.

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<sup>3</sup> B.S. is not Campbell's child. The two younger children, J.C. and M.C., are Campbell's children.

The double jeopardy clauses of the Washington State Constitution and United States Constitution provide identical protection against multiple punishments for the same offense. State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005). If a defendant is convicted multiple times for violating the same statute, the court will examine the unit of prosecution intended by the legislature in defining the crime to determine whether there are impermissible multiple convictions. Graham, 153 Wn.2d at 404. The issue presents a question of statutory interpretation and legislative intent. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). Appellate review is de novo. State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009).

The jury found that Campbell committed two assaults under two different provisions of RCW 9A.36.021. The statute provides,

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
  - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
  - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
  - (c) Assaults another with a deadly weapon; or
  - (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
  - (e) With intent to commit a felony, assaults another; or
  - (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
  - (g) Assaults another by strangulation.

Campbell was convicted under RCW 9A.36.021(1)(g) for strangling Toma

and under RCW 9A.36.021(1)(c) for assaulting her with a deadly weapon.

Campbell contends the statute does not define the unit of prosecution and that he is entitled to have any ambiguity resolved in his favor under the rule of lenity.

We disagree with Campbell's contention that the statute does not set out the unit of prosecution. Under the statute, there are seven distinct ways of committing second degree assault. Any one of the ways constitutes a single unit of prosecution. State v. Smith, 124 Wn. App. 417, 432, 102 P.3d 158 (2004) (assaulting another with a deadly weapon comprises the criminal activity measured by the unit of prosecution under second degree assault statute). The legislature defined the unit of prosecution by setting out specific alternative ways of committing the offense. Although there may be circumstances where two or more of the different ways occur simultaneously and result in only one offense, these facts are not presented in this case. Campbell's attempt to smother Toma ended before he retrieved his gun and threatened to shoot her. The fact that the assaults occurred sequentially and were separated by only a brief period of time does not turn them into a single act under a unit of prosecution analysis. State v. Soonalole, 99 Wn. App. 207, 213, 992 P.2d 541 (2000).

Campbell next argues that the two assault convictions constitute the same criminal conduct for the purpose of calculating his offender score.

The term "[s]ame criminal conduct" . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107,

123, 985 P.2d 365 (1999), aff'd, 148 Wn.2d 350, 60 P.3d 1192 (2003). The absence of any one of the three elements prevents a finding of same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The statute is generally construed to disallow most claims that multiple offenses constitute the same criminal act. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). We review a trial court's determination on the issue for an abuse of discretion or misapplication of the law. Tili, 139 Wn.2d at 122.

The State argues that Campbell waived this issue because he affirmatively acknowledged the offender score calculated by the State and did not specifically raise this issue at sentencing. In response, Campbell argued for the first time in his reply brief that his counsel was ineffective for not challenging the offender score. We permitted a supplemental assignment of error and allowed the State to respond.

Although the record is not as clear as it could be, we conclude that the issue of whether the two assaults were the same criminal conduct was considered and resolved by the trial court. The State clearly presented the issue, and the trial court clearly resolved it in the State's favor, although it did not specifically address the time, place, and victim considerations set out in RCW 9.94A.589(1)(a) and Campbell's counsel did not specifically challenge the offender score based on considering the assaults as separate offenses.

We also conclude that the trial court correctly resolved the issue. The offenses involved the same victim and were committed in the same place.

However, they were separated in time, and Campbell's intent, objectively viewed, was not the same for each offense.

It is not clear from the record exactly how long a period intervened between the two charged offenses. But the evidence is clear that there was a distinct break. Campbell held Toma on the floor and put his hands over her mouth and nose, pressing her head into the floor and limiting her ability to breathe. After M.S. arrived, Campbell let Toma up, and she sat on the bed with their two-year-old daughter. Campbell then retrieved a weapon from a nearby closet and began a second assault. Although the offenses occurred close in time, they were separate. Moreover, Campbell's intent was different for each offense. "The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next." Tili, 139 Wn.2d at 123. The test takes into consideration how intimately related the crimes are, whether there was a change in the criminal objective, and whether one crime furthered the other. State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). Campbell's first assault was primarily physical, and his intent, objectively viewed, was to assault Toma by smothering her. His second assault was primarily psychological, and his intent, objectively viewed, was to frighten and humiliate Toma by threatening her with a deadly weapon. It had the further purpose of procuring her silence about the first and second assaults. Because the offenses did not occur at the same time and had different objective intents, they did not constitute the same criminal conduct. We see no error.<sup>4</sup>

In a statement of additional grounds, Campbell first contends that the imposition of a ten-year no-contact order between him and his children is unethical and unconstitutional and violates the sovereignty of his parental rights, because there is no real evidence to support the State's accusations under the best evidence rule, other than the unlawful credibility and hearsay testimony of the alleged victim.

This argument mashes together a number of disparate elements. Insofar as it is a challenge to the sufficiency of the evidence, it is completely without merit. The evidence of Campbell's guilt was overwhelming and did not rest solely on credibility determinations or hearsay. Insofar as it is a challenge to the court's authority to impose the condition, it is also without merit. RCW 9.94A.505(8) allows a trial court to impose crime-related prohibitions. Insofar as it challenges the wisdom of such an order in this case, Campbell's argument fails. "[T]he interplay of sentencing conditions and fundamental rights is delicate and fact-specific, not lending itself to broad statements and bright line rules." In re Rainey, No. 81244-6, 2010 WL 817389, at \*5 (Wash. March 11, 2010). We

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<sup>4</sup> The result would not change if we addressed the issue as an ineffective assistance of counsel claim. To succeed on such a claim, Campbell would have to show defense counsel's representation was deficient and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Because the offenses were not the same criminal conduct, Campbell cannot show prejudice and his ineffective assistance claim would fail.

review a sentencing court's imposition of crime-related prohibitions for an abuse of discretion. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). We narrowly construe crime-related prohibitions affecting fundamental rights. State v. Warren, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Campbell has a history of violence, including threats to cause Toma to abort their youngest child. He attacked Toma while she was comforting their youngest child and threatened Toma with a gun while the two sat on a bed. He continued the attack even though Toma's oldest child begged him to stop, telling that child that his mother should be treated this way. At sentencing, the trial court heard information setting out the effects these events had on all three children. The no-contact order does impact Campbell's rights to see his children. But given the horrific circumstances of these offenses and Campbell's history, and the effect on the children, Campbell has not shown that the trial court abused its discretion in imposing this no-contact order.

Campbell next argues that the jury pool was tainted by the inclusion of a juror who stated during voir dire that he worked at Ryther Child Center and believed that allegations of abuse by children are generally borne out.

There is no record of voir dire. However, before the presentation of evidence commenced, trial counsel moved for a mistrial, alleging that juror number 1 made statements heard by everyone in the jury panel that tainted the entire jury pool. The trial judge indicated the matter was discussed at sidebar

and that what the juror said was that it was harder not to believe children and that their reports tend to bear out. However, the juror also said he had been falsely accused of abuse by children. The trial judge concluded there was no evidence that this juror's statements tainted the jury pool and denied the motion for a mistrial. There was no error.

Campbell next argues that the trial judge was not impartial because the judge allowed the information to be amended on the day of trial, failed to limit the prosecutor's closing argument, gave unconstitutionally vague jury instructions, and did not allow a missing witness instruction.

This argument also conflates a number of issues. The court allowed the State to add a second assault charge on the day of trial but conditioned the amendment on allowing defense counsel whatever time she needed to prepare to defend the charge. After a recess to allow Campbell and defense counsel to confer, defense counsel stated she was prepared and elected to proceed to trial that day. Pretrial matters were heard on January 15, 2009, and jury selection did not begin until January 20. Nothing in this procedure suggests that the trial judge was not impartial or that the amendment prejudiced Campbell's ability to defend against the charges. Merely alleging that the trial court gave unconstitutionally vague instructions without identifying what instructions are challenged or why is not sufficient to raise an issue that merits consideration. Campbell's counsel proposed a missing witness instruction for Detective Calhoun, who was mentioned in the State's trial brief and mentioned by other

witnesses, but did not testify. Detective Calhoun was under subpoena but did not appear for reasons which are not shown in the record. The court found she was not peculiarly under the State's control and refused the instruction. As there is a legitimate reason for refusing the instruction, Campbell has not shown how the refusal demonstrates any bias or prejudice on the part of the trial judge. Campbell's other allegations fail to demonstrate that the trial judge was not impartial.

Campbell finally argues that the evidence is insufficient to show he was "armed," that the testimony of Patti Schaak was designed to circumvent the hearsay rule, that the weapon found in his car should not have been admitted for lack of foundation, that his civil rights were violated by the unauthorized search of his vehicle, and that it was unfair to exclude evidence that Toma's mother worked with Toma in a topless bar.

Campbell again fails to distinguish between different issues. Toma and B.S. both testified that Campbell used a weapon, and Campbell was in possession of a weapon when he was apprehended. This is more than sufficient to support the jury's finding that he was "armed." Before trial, the State moved to admit Schaak's testimony as to what Toma and B.S. said to her immediately after the assaults. The court ruled that the statements could be admitted under the excited utterance exception to the hearsay rule. Campbell has not shown error. There was testimony regarding the recovery of the gun and testimony by Toma that it was the gun used in the assault. This is sufficient foundation to

admit the gun into evidence.

Campbell was arrested on an outstanding warrant for the crime of assault in the second degree-domestic violence, alleged to have been committed with a handgun. At the time of this arrest, the police had a reasonable basis to believe that this gun was in Campbell's possession concealed in the car he was driving when stopped. The search of this car for the handgun was lawful. Arizona v. Gant, \_\_\_\_ U.S. \_\_\_\_, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009); State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009).

Counsel on cross-examination asked Toma if she was working in a topless bar when she first met Campbell. The prosecutor objected on relevance grounds, and the court sustained the objection. The court later put in the record a sidebar discussion indicating it was not allowing evidence that either Toma or her mother worked in a topless bar on the ground that such evidence was not relevant. Octavia Dahl, Toma's mother, testified that Toma called her after the incident and asked her to get some clothes from Toma's apartment. When Dahl did so, she found papers belonging to Campbell and ammunition. On cross-examination, counsel asked if Dahl worked in a bar and if that was the bar she encouraged Toma to work in. Dahl answered yes. As there is no showing of why the fact that either Toma or her mother may have worked in a topless bar is relevant, there is no basis for any claim of error.

#### CONCLUSION

We reject Campbell's double jeopardy and same criminal conduct claims.

We find his statement of additional grounds without merit. Affirmed.

Leach, A.C.J.

WE CONCUR:

Cox, J.

Becker, J.